

Southam (Migration) [2018] AATA 586 (9 February 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Claire Louise Southam
CASE NUMBER:	1621935
DIBP REFERENCE(S):	BCC2015/1148317
MEMBER:	Adrienne Millbank
DATE:	9 February 2018
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 09 February 2018 at 8:05am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Partner of an Australian citizen – Relationship ceased – No mutual commitment to a shared life – No sponsorship form submitted

LEGISLATION

1. *Migration Act 1958*, ss 5CB, 65, 359C
Migration Regulations 1994, Schedule 2, cls 820.211, 820.221, rr 1.03, 1.09, 1.20

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 6 December 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 17 April 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) and 820.211(2)(c) because insufficient evidence was provided to demonstrate that the applicant was the de facto partner of her sponsor, and no signed sponsorship form (Form 40SP) or identification was provided from the applicant's sponsoring partner.
5. On 17 May 2016 the Department wrote to the applicant requesting further evidence of relationship as well as a sponsorship form and identity documents for herself and her sponsor. On 2 June 2016 the applicant emailed the Department advising that she had been ill, and that she was having second thoughts about the relationship. She stated that her sponsor had been abusive and manipulative and that she was not sure whether to continue with it. She requested further information regarding her options.
6. On 3 June 2016 the Department wrote to the applicant inviting her to comment on the information that her relationship with the sponsor had ended, and to provide information about her circumstances if she believed she should be considered for the grant of the visa even if her relationship had ceased. The Department provided information on the circumstances which could be considered for the grant of the visa.
7. On 30 June 2016 the applicant wrote to the Department stating that she had been ill and requesting an extension of time to provide the information. On 28 July 2016 the applicant wrote to the Department advising she was well again and working full-time.
8. No further information was provided to the Department in support of the applicant's claim to be in a relationship; no sponsorship form and proof of identity was provided; and no further information was provided regarding any intention to pursue the application for a Partner visa should the applicant's relationship have broken down. 'Reasonable concerns' were expressed by the Delegate, in the record of decision, that the relationship had ended.
9. On 19 December 2017 the Tribunal wrote to the applicant, through her representative, inviting her to provide information in support of her claim to be in a genuine spousal or de facto relationship with her sponsor. On 21 December 2017 the Tribunal received a request for an extension of time to provide the information. The Tribunal agreed to the request and advised the applicant that the information had to be received by 16 January 2018. The applicant was advised that if the information was not received by this date the Tribunal could make a decision without taking any further action to obtain the information. She was further advised that she would also lose any entitlement she might otherwise have had to give evidence and present arguments at a hearing.

10. No response was received, and the Tribunal has, pursuant to s.359C(1), proceeded to decision without taking further action to obtain the information.
11. The applicant was represented in relation to the review by her registered migration agent.
12. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The applicant was born in London in 1983 and is a British citizen. She first arrived in Australia on 21 August 2004 on a Tourist (subclass 976) visa. She subsequently arrived on 17 July 2009 and 22 July 2010 on a Working Holiday Maker (subclass 417) visa, and on 13 August 2014 on a Temporary Work (subclass 457) visa. On 17 April 2015 she lodged the Partner visa application and was granted Bridging (subclass 010 and subclass 020) visas in association with this application.
14. On her application form the applicant stated that her father was an Australian permanent resident and that her mother, brother and sister were living in the United Kingdom.
15. On her application form she declared three previous relationships: one with a male, from February 2000–July 2003, which ended when the applicant realised she was same-sex attracted; one from January 2007–September 2009, which ended through infidelity; and one from February 2011–August 2012, which ended when the other party moved to Victoria.
16. The sponsor was born in 1994 and according to information supplied by the applicant in her application form, is an Australian citizen by birth. No sponsorship form or evidence of identity was provided. No written statements by the sponsor—or photographs of the sponsor—were provided.
17. On her application form the applicant claimed that she met the sponsor at a ‘scarlet ladies night’ on 26 January 2013; that they entered into a de facto relationship on 13 March 2013; and that they committed to a shared life to the exclusion of all others on 1 July 2013.
18. As noted above, the applicant advised the Department on 2 June 2016 that she was unsure as to whether she was going to continue in the relationship, and did not respond to invitations to provide further information.
19. The issues in the present case are whether the parties were in a genuine de facto relationship at the time of application and this decision, and whether the applicant was in fact sponsored by an Australian permanent resident or citizen at the time of application and this decision.

IS THE APPLICANT IN A DE FACTO RELATIONSHIP?

20. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of a sponsor who is an Australian citizen by birth.
21. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married

if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

22. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

FINANCIAL ASPECTS OF THE RELATIONSHIP

23. On her application form the applicant claimed that the parties were in a 'modern relationship', whereby there was no need for a joint bank account because 'transferring money is so easy via internet'. She claimed that they both paid bills for things like utilities, but the accounts were in her name only as she set them up while the sponsor was working.
24. Evidence was provided in the form of a bond receipt from the Queensland Residential Tenancies Authority dated 3 February 2014 that the parties rented a residential property in joint names in 2014.
25. No other evidence was provided that the parties have pooled their financial resources or shared day-to-day household expenses.

NATURE OF THE HOUSEHOLD

26. Further to the bond receipt, a copy of an entry notice was provided, issued to both parties as joint tenants, by the RTA, for the date of 2 October 2014.
27. On her application form the applicant declared that she and the sponsor shared their large granny flat with three cats and one dog (the sponsor worked in an animal shelter), and that they shared the cleaning although the applicant did most of it because she suffered mildly from a compulsive disorder.
28. No further evidence was provided regarding the parties' living arrangements.
29. A rates bill, for the period 1 April 2015–30 June 2015 was provided, but in the name of the applicant only, addressed to the applicant at a Durack address. No claim was made or evidence provided that the sponsor had moved with the applicant and lived with her at this address.

SOCIAL ASPECTS OF THE RELATIONSHIP

30. On her application form the applicant declared that she and the sponsor 'usually' went out together but that sometimes the sponsor went out with her friends. She claimed that they went to 'jiu jitzu' together and that when she visited her family the sponsor would often accompany her.
31. No further evidence was provided that the parties have functioned socially as a de facto couple, or that they are recognised and related to by family and friends as a de facto couple.

NATURE OF PERSONS' COMMITMENT TO EACH OTHER

32. On her application form the applicant stated that she and the sponsor were 'engaged to be married', but that they intended to wait until the sponsor was 25 years old, because the applicant thought the sponsor was too young for this step.

33. No further evidence was provided that the parties are committed to the relationship and that they see it as long-term.
34. As noted above, the applicant emailed the Department on 2 June 2016, advising that that she was having second thoughts about the relationship as the sponsor had been abusive and manipulative, and requesting information regarding her options.
35. As noted above, no response was received by the Department to their requests for further information from the applicant, including regarding the sponsorship, and the record of decision included an expression of the Delegate's 'reasonable concerns' that the relationship had ceased.

FINDINGS

36. The Tribunal accepts that the parties rented a flat together in 2014 and, on the basis of the information provided by the applicant in her application form, that they were in a relationship in that year. Given the lack of further information and evidence across the four factors specified for consideration in r.1.09A(3), however, the Tribunal is not able to be satisfied that the relationship they were in, in 2014, was a genuine de facto relationship.
37. No evidence was provided, and the Tribunal is not satisfied, that the parties are in any sort of relationship at the time of decision.
38. The Tribunal therefore does not find that the parties are in genuine and continuing relationship, and does not find that they live together or not separately and apart on a permanent basis.
39. On the basis of the above the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time the visa application was made or the time of this decision.
40. Therefore the applicant does not meet cl.820.211(2)(a) or cl.820.221.
41. As noted above, the applicant was offered information about but has made no claims against alternative criteria in c.820.211(7), 820.211(8), 820.211(9), 820.221(2), 820.221(3) (death, family violence, child exceptions).

IS THE APPLICANT SPONSORED?

42. Clause 820.211 requires at the time of application, the applicant meets one of several alternative sub criteria. These include 820.211(2)(c) which requires that the applicant was, at the time of application, sponsored by the sponsor, where such person has turned 18; or where they have not, by the sponsor's parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or eligible New Zealand citizen (as defined in r.1.03 of the Regulations).
43. At the time of decision, the applicant must continue to be sponsored by the sponsor, and the sponsorship must have been approved by the Minister and be still in force. Exceptions apply in certain circumstances where the sponsor has died, or family violence has occurred, or a child is involved.
44. Approval of sponsorship is subject to limitations contained in r.1.20J of the Regulations which sets a limit on the number of people that a person can sponsor in a lifetime and a minimum time that must lapse between each sponsorship, and in r.1.20KA which sets a limit on the period before which certain Parent visa holders can sponsor another person for a Partner visa. There are further limits imposed by r.1.20KB in relation to sponsors charged

with, or convicted of, certain offences where the visa application was made on or after 27 March 2010, and r.1.20KC for sponsors convicted of a relevant offence who have a significant criminal record in relation to the relevant offence where the visa application was made on or after 18 November 2016.

45. As noted, no sponsorship form was provided at the time of application, and the applicant did not respond to the Department's requests on 17 May 2016 and subsequently, to provide further evidence of relationship including a Sponsorship form 40SP and identity documents. The Delegate therefore found that the applicant did not meet Subclause 820.211(2)(c).
46. No information or evidence was provided to the Tribunal indicating that a sponsorship form has since been provided. As discussed above, no claim was made by the applicant that death or child or family violence exceptions apply. The Tribunal therefore finds that the applicant does not meet 820.211(2)(c) and 820.221(1).
47. On the evidence before the Tribunal the requirements of Subclauses 820.211(2)(a) and (c) and Clause 820.221 are not met.
48. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

49. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Adrienne Millbank
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).